SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1947

No. ~~404~~ 12 12

ARTHUR OSMAN, DAVID LIVINGSTON, JACK PALEY, ET AL.,

Appellants,

vs.

CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

VICTOR RABINOWITZ,
Counsel for Appellants.

NEUBURGER, SHAPIRO, RABINOWITZ & BOUDIN,
Of Counsel.

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STATUTES CITED

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 46-729

ARTHUR OSMAN, DAVID LIVINGSTON, JACK PALEY, SHIRLEY MOSHINSKY, AND WHOLESALE AND WAREHOUSE WORKERS UNION, LOCAL 65, AN UNINCORPORATED ASSOCIATION OF MORE THAN SEVEN PERSONS,

Plaintiffs,

against

CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD,

Defendant

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Arthur Osman, David Livingston, Jack Paley, Shirley Moshinsky, and Wholesale and Warehouse Workers Union, Local 65 (hereinafter referred to as Local 65), plaintiffs in the above entitled cause, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the order of the District Court.

This is an action brought by plaintiffs in the District Court of the United States for the Southern District of New

York to enjoin the defendant who is Regional Director of the National Labor Relations Board for the Second Region, from enforcing the provisions of Section 9(h) of the National Labor Relations Act, as amended, Title 29 U. S. C. Section 159(h), 61 Stat. 143; from conducting an election of employee representatives without placing the name of plaintiff Local 65 on the ballot, and from giving effect to a consent election agreement entered into over the protest and without the consent of plaintiff Local 65.

A three-judge statutory court was convened, pursuant to the provisions of Section 380a of Title 28 U. S. C.; 50 Stat. 751. That statutory court on October 20, 1948, entered an order dismissing the complaint on the merits and denying plaintiffs' motion for an interlocutory injunction, holding that the provisions of the statute challenged were invalid and not repugnant to the Constitution.

A. Statutory Provisions on Which Jurisdiction Rests

At the time this action was commenced and at the time the three-judge statutory court was convened as aforesaid, plaintiff was proceeding under the provisions of Section 380a of Title 28 of the United States Code. After the commencement of the action, but prior to the entry of an order, said section was superseded by the provisions of Sections 2282, 1253 and 2101 of the Act of June 25, 1948, which constituted a general revision of the Judicial Code. Those sections read as follows:

> Section 2282. *Injunction against enforcement of Federal statute; three-judge court required.*
>
> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard

and determined by a district court of three judges under section 2284 of this title.

Section 1253. *Direct appeals from decisions of three-judge courts.*

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Section 2101. *Supreme Court; time for appeal or certiorari; docketing; stay.*

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

B. The Statute of the United States Involved in the Action

The validity of Section 9(h) of the National Labor Relations Act, as amended, 29 U. S. C. 159(h), 61 Stat. 143, is challenged in this action on the ground that said section is repugnant to the Constitution of the United States. This provision reads as follows:

"9(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month

period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

C. Date of Judgment or Decree Sought to Be Reviewed and Date of Petition for Appeal

The date of the judgment and order of the District Court here sought to be reviewed is October 20, 1948.

The petition for allowance of appeal was presented on October 21, 1948.

D. Substantial Nature of the Question Presented

This is an action instituted by Local 65, an unincorporated labor organization, Arthur Osman, president of Local 65, David Livingston, its vice-president, Jack Paley, its secretary-treasurer, and Shirley Moshinsky, a member. The suit was brought to restrain the Board from giving force and effect to Section 9(h) of the National Labor Relations Act, as amended, on the ground that this provision is repugnant to the Constitution of the United States in that it constitutes an impairment of the right of free speech and free assembly and is an infringement upon the rights of the plaintiffs and the other officers and members of the plaintiff labor organization to associate and join together for their common and lawful purposes, and that said section deprives the plaintiffs of liberty without due process of law, all in violation of the First, Fifth, Ninth and Tenth Amendments. The section is further attacked on the ground that it is

vague, indefinite and uncertain in violation of the Fifth Amendment, and on the further ground that it constitutes a bill of attainder in violation of Article 1, Section 9, of the Constitution.

This action and a companion action which has similarly been appealed (*American Communications Association* v. *Douds*, now on the docket of the United States Supreme Court, October Term, 1948 No. 336), are the first attacks in the Southern District of New York upon the validity of the requirements of the Taft-Hartley Act that labor organizations file the so-called "non-Communist affidavits" in order to be eligible to participate in proceedings before the National Labor Relations Board. A decision by the Supreme Court on the validity of these provisions is awaited by a substantial number of labor organizations, both national and local. Only a decision by the Supreme Court can put at rest the many doubts and uncertainties which now prevail throughout the labor movement and which have caused numerous instances of industrial unrest.

This is not the first case before the Supreme Court in which this issue was raised. In *National Maritime Union* v. *Herzog*, Civil Action No. 4874-47, a proceeding was brought in the United States District Court for the District of Columbia to challenge the constitutionality of Sections 9(f), (g) and (h) of the Act, that union having failed to comply with any of those provisions. The Supreme Court held that Sections 9(f) and (g) were constitutional and expressly refrained from passing on the constitutionality of Section 9(h).

We do not believe that any serious contention will be made by the defendant that a substantial constitutional question is not herewith presented. As a matter of fact, in *National Maritime Union* v. *Herzog*, the Solicitor General of the United States in filing a statement against the juris-

diction of the Supreme Court said: "The Board agrees with the appellant that the questions relating to the constitutionality of 9(h), the affidavit provision, are substantial in character and present issues of great public importance in the administration of the Act. The Board believes it to be in public interest that there be an early final determination of the constitutionality of this paragraph."

Moreover, in *American Communications Association* v. *Douds*, referred to above, the defendant interposed no objections to the jurisdiction of the Court. Although the record in this case differs somewhat from that in *American Communications* v. *Douds*, we do not believe that any of those differences go to the issue of jurisdiction.

The present case, like the companion action, stems from a petition for certification of representations filed by a rival labor organization. Local 65 sought to intervene in the proceedings. The National Labor Relations Board refused to permit such intervention on the ground that Local 65 had not complied with the provisions of Section 9(h). The Board proceeded to recognize a consent election agreement entered into between a rival labor organization and the employer without the consent and over the objection of Local 65.

The questions presented include the following:

(1) Whether the provisions of Section 9(h) abridge the rights of freedom of speech, press and assembly guaranteed to each of the plaintiffs by the First and Fifth Amendment to the Constitution.

(2) Whether the provisions of Section 9(h) constitute a bill of attainder in violation of Article 1, Section 9 of the Constitution.

(3) Whether the provisions of Section 9(h) are repugnant to the Constitution in that they are vague and indefinite in conflict with the requirements of the Fifth Amendment.

1. Section 9(h) abridges the rights of freedom of speech, press and assembly guaranteed to each one of the plaintiffs by the First Amendment to the Constitution.

Labor organizations and their members both are entitled to the exercise of the basic rights provided in the First Amendment to the Constitution. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Thomas* v. *Collins*, 323 U. S. 516, *NLRB* v. *Jones & Laughlin*, 301 U. S. 1, 33, 34; *Texas & N. O. R. Co.* v. *Brotherhood*, 281 U. S. 548, 570; *Virginia Railway* v. *System Federation*, 300 U. S. 515, 543.

The complaint clearly indicates the manner in which these rights are denied to the plaintiff organization and its members. By denying to Local 65 the opportunity to participate in election proceedings while affording those opportunities to rival labor organizations, the basic rights guaranteed by the Constitution are impaired. If a rival labor organization is certified as a result of a proceeding in which Local 65 is denied an opportunity to participate, Local 65 is by the statute under consideration denied the right to strike (Section 8(b)(4)(C); Section 303(3); or to obtain the assistance of other labor organizations in its dispute with an employer (Section 8(b)(4)(B); Section 303(2)). The statutory scheme in establishing a rival labor organization as the exclusive bargaining agency while denying to the plaintiffs the opportunity to qualify as such agency because of the political beliefs of the officers of the union results in an effective denial of the basic constitutional right to function and operate as a trade union.

The placing of the conditions contained in Section 9(h) upon the exercise of these basic rights constitute a burden upon their exercise. Congress cannot forbid the enjoyment of a constitutional right nor can it burden or impair such right by indirection. *Thomas* v. *Collins*, 323 U. S. 516; *West Virginia* v. *Barnette*, 319 U. S. 624; *Lovell* v. *Griffin*,

304 U. S. 444, *Cantwell* v. *Connecticut*, 310 U. S. 300; *Grosjean* v. *American Press Co.* 297 U. S. 233.

Section 9(h) further violates the Constitution by adopting a test of guilt by association, a test which has been repeatedly disapproved by the Supreme Court. *Schneiderman* v. *U. S.*, 320 U. S. 118; *Bridges* v. *Wixon*, 326 U. S. 135 (concurring opinion by Murphy, J.).

2. *Section 9(h) constitutes a bill of attainder in violation of Article I, Section 9 of the Constitution.*

Section 9(h) denies certain rights to unions whose officers are members or affiliates of a specifically named political party. By naming that political party in the legislation under attack, Congress sought to make irrelevant the activities or beliefs of that party or of its members. Congress may not legislate the conclusion that an individual or a political party holds certain beliefs or promotes certain doctrines. This is basically a judicial function, and for Congress to take over this function constitutes a bill of attainder. *United States* v. *Lovett*, 328 U. S. 303; *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

3. *Section 9(h) is repugnant to the Constitution in that it is vague and indefinite in conflict with the requirements of the Fifth Amendment.*

Legislation must conform to the requirements of precision and freedom from ambiguity that have been established as basic to our concept of due process of law. *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233; *Lanzetta* v. *New Jersey*, 306 U. S. 451.

Section 9(h) does not meet these requirements since its language is not sufficiently clear and unambiguous. Terms such as "affiliated," "believe in," "teaches," and "supports" are not susceptible of exact definition, and none of

them furnishes such a clear standard of meaning as to meet the Constitutional requirements. No definition of any of these terms is provided in the Act and no interpretation is available either from context or usage. Yet a failure to understand these vague terms may subject one to a severe criminal penalty.

Opinion of the Court

A copy of the opinion of the statutory court is affixed hereto as Exhibit A.

Conclusion

It is thus clear that this appeal is within the exclusive jurisdiction of the Supreme Court and that substantial questions of widespread importance are involved, requiring a review of the judgment of the statutory court on the merits.

Respectfully submitted,

VICTOR RABINOWITZ,
NEUBURGER, SHAPIRO, RABINOWITZ & BOUDIN,
Attorneys for Plaintiffs.

October 21, 1948.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 46-729

ARTHUR OSMAN, DAVID LIVINGSTON, JACK PALEY, SHIRLEY MOSHINSKY, and Wholesale and Warehouse Workers Union, Local 65, an unincorporated association of more than seven persons, *Plaintiffs,*

against

CHARLES T. DOUDS, individually and as Regional Director of the National Labor Relations Board, *Defendant.*

Memorandum

This case has been submitted upon the same memoranda of law as were filed and argued in *Wholesale and Warehouse Workers Union* v. *Douds*, Civil No. 46-157. The majority of the court adheres to the opinion filed in that case and Judge Rifkind adheres to his dissent therein. Accordingly, the plaintiffs' application is denied and the defendant's motion is granted upon the authority of our prior decision.

THOMAS W. SWAN,
Circuit Judge
ALFRED C. COXE,
District Judge
SIMON H. RIFKIND,
District Judge

Dated: October 19, 1948

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

No. ~~484~~ 12

ARTHUR OSMAN, DAVID LIVINGSTON, JACK PALEY, et al.,

Appellants,

vs.

CHARLES T. DOUDS, individually and as Regional Director of the National Labor Relations Board.

MOTION FOR ORDER NOTING PROBABLE JURISDICTION AND SETTING CASE DOWN FOR ARGUMENT

NEUBURGER, SHAPIRO, RABINOWITZ & BOUDIN,
Attorneys for Appellants,
76 Beaver Street,
Borough of Manhattan,
New York City, N. Y.

Supreme Court of the United States

ARTHUR OSMAN, DAVID LIVINGSTON, JACK PALEY, et al., Appellants, vs. CHARLES T. DOUDS, individually and as Regional Director of the National Labor Relations Board.	No. 404 October Term, 1948

TO THE SUPREME COURT OF THE UNITED STATES:

Appellants hereby respectfully move this Court for an order noting probable jurisdiction in the above matter and setting this case down for argument on an appropriate date early in the October 1949 Term of this Court.

The grounds for this motion are as follows:

This is an appeal, pursuant to Section 2101 of the Act of June 25, 1948, from an order of a three-judge statutory court for the Southern District of New York denying a motion for a temporary injunction and dismissing the complaint herein. This action involves the constitutionality of the Labor Management Relations Act of 1947 (popularly known as the Taft-Hartley Law) and, particularly, Section 9(h) thereof.

This case was docketed in this Court on or about November 8, 1948. Case No. 336, *American Communications Association* v. *Douds*, which raised the same question of constitutionality on a slightly different record had been docketed shortly prior thereto. On November 8, 1948, the Court noted probable jurisdiction in the *American Communications Association* case, but took no action in this matter, presumably because the Court felt that argument in the one matter would be sufficient to decide the issues involved in both.

The *American Communications Association* case would, in the normal course, have been reached for argument on or about January 19, 1949. On the preceding day, the Court, on its own motion, postponed argument in that matter indefinitely. A few days later, the Court granted a writ of certiorari in Case No. 431, *United Steelworkers v. N. L. R. B.*, which similarly raised the question of constitutionality of the Taft-Hartley Act, but on a record completely different from the record in the *American Communications Association* case and in the instant case. Both the *American Communications Association* and the *United Steelworkers* cases were set down for argument during the session of the court beginning on March 14, 1949.

Shortly prior to that date, the Solicitor General made an application for postponement of argument in both cases. The appellants in both cases consented to the continuance and the matter was accordingly postponed to the session of the court beginning on April 18, 1949.

Prior to that date, the appellants in both the *American Communications Association* and the *Steelworkers* cases made a further application for a continuance, this time until the next term of the court in October, 1949.

Had the argument in the *American Communications Association* and *Steelworkers* cases proceeded, either in January, March or April, there would presumably have been a decision by this Court by the end of the current term. Such a decision would probably have resulted in an effective adjudication of the rights, not only of the appellants in those two cases, but of the appellants in the instant case. The two continuances, however, delayed such an adjudication for at least six months and perhaps longer.

The appellants herein did not consent to either the application made in March, nor the application made in April, nor was their consent asked. Had they been consulted, they would have opposed any delay. The continuances did result in substantial injury to appellants, as this case is of critical importance. That is generally true where basic constitutional issues are involved; it is par-

ticularly true in the instant case where the ability of the appellant union to represent its members satisfactorily and to carry on its function as a trade union has been severely impaired by the repeated delays brought about with the consent of, or on the motion of, persons who are not parties to the instant action and have no interest therein. Moreover, appellants are plaintiffs in another action now pending in the Southern District of New York, raising the same issue as that raised herein. Prosecution of that action is being held up pending the determination of this appeal by this Court.

Presumably, the Steelworkers and American Communications Association consented to or applied for the continuances for reasons of their own. But it seems most unjust that the appellants herein should suffer a delay in the adjudication of their rights because other parties failed to press their appeals.

It is now obviously too late to argue the case at this term of the Court. We do request, however, that the Court note probable jurisdiction now so that we will not be faced with the possibility of still further delay in the October 1949 Term. Appellants have requested from American Communications Association assurances that no further applications for continuance will be made, but have failed to receive any such assurance. The failure of American Communications Association and the Steelworkers to prosecute their appeals at this term gives rise to at least a reasonable inference that they may not be prepared to proceed in October any more than they were prepared to proceed in March or April.

The adequate protection of the rights of the appellants herein would seem to require that the Court act in noting jurisdiction before the contemplated recess on June 20th. Should American Communications Association and the Steelworkers request a further adjournment in October, or should the former decide that it does not wish to prosecute its appeal at all, still further delay will result (since a decision in the *Steelworkers* case may not settle the issues

raised in the instant matter), with further injury to these appellants. The Court could not then note jurisdiction in this case until October, and there would ensue a further delay of from six to eight weeks, for the printing of the record and the preparation of briefs, before argument.

It will be noted that appellants in the *American Communications Association* case and appellants herein are represented by the same counsel. It does not necessarily follow, of course, that the interests of appellants in both cases are identical and, as has been pointed out above, the appellants herein were most anxious to argue their appeal during the current term of the Court. The fact that the same counsel does represent appellants in both cases, however, will mean that should the Court note probable jurisdiction in the instant matter, and should American Communications Association, the Steelworkers, and the appellants herein, all be prepared to argue their cases in October, no additional time will be required for argument, because of the addition of this case to the other two. The appellant herein has no objection to a consolidation of this and the *American Communications Association* cases for purposes of argument and will not request the Court for any extended time by virtue of the fact that the two cases will be argued together.

Dated: New York, N. Y., May 25, 1949.

Respectfully submitted,

NEUBURGER, SHAPIRO, RABINOWITZ & BOUDIN,
By VICTOR RABINOWITZ,
Attorneys for Appellants.

Supreme Court of the United States

OCTOBER TERM, [redacted]

No. 12 of 1949

ARTHUR OSMAN, DAVID LIVINGSTON, JACK PALEY, et al.,
Appellants,

vs.

CHARLES T. DOUDS, Individually and as Regional Director of the National Labor Relations Board.

APPELLANTS' PETITION FOR REHEARING

Appellants respectfully request that this Court reconsider its decision filed herein on the 5th day of June, 1950, and grant appellants a rehearing in this case pursuant to Rule 33.

We shall not enter into an extensive discussion of the critical issues which are presented to the Court. Nor shall we at this point make any effort to set forth even briefly the reasons why we believe that the prevailing opinion of Mr. Chief Justice Vinson was in error. Those arguments were previously submitted to the Court in the petition for rehearing filed in *American Communications Association* v. *Douds*, No. 10, October Term, 1949, and which in part are adopted in the opinions of Justices Black, Frankfurter and Jackson filed in that case.

Without discussing the arguments in detail, it is sufficient to note here that this case, which is probably the most important civil liberties case to come before the Court in a generation, has been decided by a 4-4 vote of the Court, and that two of the Justices who participated in the final vote did not hear oral argument. The decision of the three-judge statutory court which was thereby affirmed was likewise sharply divided on the issues.

It needs no extensive citation of authority to establish the fact that this is a most unsatisfactory basis upon which to decide a case of such monumental importance. There are now pending in the lower federal courts and in the state courts literally scores of cases whose outcome would be influenced most decisively by a clear-cut decision of this Court on the constitutional issues involved. Many of those cases can never reach this Court, and still others can reach the Court only after years of litigation and much expenditure of funds, frequently by litigants who can ill afford it. While we recognize that, in the view of the Court, the issues here are close ones, and that in any event a division of the Court is inevitable, we submit that every possible effort ought to be made to secure a decision by a majority of the Court so that the issues raised herein may be disposed of.

Respectfully submitted,

VICTOR RABINOWITZ,
Attorney for Appellants, Arthur Osman, David Livingston, Jack Pale[illegible], et al.

LEONARD B. BOUDIN,
BELLE SELIGMAN,
of Counsel.

Certificate of Counsel

I, VICTOR RABINOWITZ, do hereby certify that I am attorney for the appellants herein, and that this petition for rehearing is presented in good faith and not for delay.

June 14, 1950.

VICTOR RABINOWITZ